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7 **UNITED STATES BANKRUPTCY COURT**
8 **DISTRICT OF ARIZONA**

9 In re:

10 LEEWARD HOTELS, L.P., an Arizona
11 limited partnership,

12 Debtor.

In Proceedings under Chapter 11

Case No. B-99-09162-ECF-GBN

**SECURED LENDER'S LIMITED
OBJECTION TO FIRST AMENDED
APPLICATION FOR ALLOWANCE AND
PAYMENT OF COMPENSATION AND
REIMBURSEMENT OF EXPENSES OF
HEBERT, SCHENK & JOHNSEN, P.C.**

15 LaSalle National Bank, in its capacity as Trustee for the registered holders of DLJ Mortgage
16 Acceptance Corporation Commercial Mortgage Passthrough Certificates Series 1997-CF1, as serviced
17 by Lennar Partners, Inc. (the "Secured Lender"), objects to the "First Amended Application For
18 Allowance and Payment of Compensation and Reimbursement of Expenses of Hebert, Schenk &
19 Johnsen, P.C. ("HSJ") for Services Rendered and Expenses Incurred on Behalf of Debtor," filed on
20 April 28, 2000 (the "Amended Application").
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22 **Conflict Issues Preserved.** The Secured Lender remains as concerned as ever about the actual
23 conflict of interest that the Secured Lender believes exists with respect to HSJ's representation of the
24 Debtor in these proceedings. The Secured Lender remains as concerned as ever about HSJ's failure to
25 disclose significant pre-petition connections with the Debtor and affiliates of the Debtor in HSJ's Rule
26 2014 Statement submitted on August 2, 2000 in support of HSJ's application to be retained in these
27 proceedings. These concerns are now heightened in light of the Amended Application, which contains
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1 allegations indicating the confusion that continues to pervade HSJ's representation of the Debtor, which
2 has numerous affiliates, all controlled and owned solely by one man, William Kilburg. For example,
3 Paragraph I.A.3 on page 2 of the Amended Application asserts that "Applicant [HSJ] has rendered
4 professional services to the Debtor since on or about January 18, 1999." The Debtor did not even **exist**
5 as a legal entity until sometime in March 1999, a fact asserted in Paragraph I.C.2.f on page 7 of the
6 Amended Application: "The Debtor was formed in March 1999." Obviously, HSJ cannot have
7 represented the Debtor for two months before it existed. Instead, HSJ's services were obviously for
8 affiliates of this Debtor controlled by Mr. Kilburg, and it is these connections (and the actual conflict)
9 that remain undisclosed and unjustified.
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12 The Secured Lender appreciates that the Court has "bifurcated" consideration of the Amended
13 Application into (1) the "reasonableness" of the fees and expenses sought and (2) the conflict and
14 disclosure issues that the Secured Lender has raised in connection with HSJ's original fee application.
15 With respect to the second set of issues, the Secured Lender expressly incorporates, and preserves here
16 its right to have the Court consider, all the Secured Lender's arguments raised in its first objection to
17 HSJ's original fee application, dated March 13, 2000, and at the first hearing on both the original
18 application and the Secured Lender's Motion to Compel, held on April 20, 2000.
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20 **No Surcharge Is Appropriate.** The Secured Lender also preserves and reiterates its objection to
21 the Amended Application with respect to a surcharge against the Secured Lender's cash collateral for
22 payment of any fees or expenses approved under the Amended Application. All cash generated by the
23 Debtor's business operations – in fact, all cash existing in this estate now or in the future – constitutes
24 the Secured Lender's cash collateral.¹ The Secured Lender must again reiterate that it has not, does not,
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28 ¹ To be exact, the cash generated by the Albuquerque Hotel is cash collateral held by LaSalle National Bank, as trustee, as
serviced by AMRESKO. All other cash from all other hotels constitutes the cash collateral held by LaSalle National Bank, as
trustee, as serviced by Lennar Partners, Inc.

1 and will not consent to the use of cash collateral for the payment of any fees or the reimbursement of
2 any expenses for HSJ or any other of the Debtor's professionals. Furthermore, the Secured Lender
3 incorporates reasserts here all arguments establishing that the Debtor may not surcharge the Secured
4 Lender's collateral under Bankruptcy Code § 506(c), set forth in detail in the Secured Lender's Marcy
5 13, 2000 objection to HSJ's original fee application. HSJ cannot even remotely demonstrate that the fees
6 and expenses sought benefited the Secured Lender, as is required under Bankruptcy Code § 506(c). *See,*
7 *e.g., In re Cascade Hydraulics & Utility Service, Inc.*, 815 F.2d 546 (9th Cir. 1987); *In re Vantex Land*
8 *Development Co.*, 47 B.R. 261 (Bankr. D. Ariz. 1985). Since the beginning of this case, the Debtor has
9 been singularly focussed on a reorganization plan that would allow the Debtor to keep its hotels, and
10 operate them on the Secured Lender's dime, for a period of seven years, all before payment of more than
11 90% of the Secured Lender's debt is made. All the risk of those operations lies squarely with the
12 Secured Lender, since the Debtor, nor Mr. Kilburg, nor any of the myriad Kilburg-controlled and -
13 owned insiders has no at-risk capital at stake.

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17 Considering the Amended Application at this stage in the proceedings – before it is even clear
18 that the Debtor's efforts to reorganize will even succeed – is premature at best. This Court should not
19 consider rewarding HSJ's efforts unless and until the Court is convinced that the Debtor's plan is going
20 to be confirmed. If it is not, and instead the Secured Lender's liquidating plan is to be confirmed, HSJ
21 will be hard-pressed to demonstrate any benefit to the estate for its services and disbursements.

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23 **Unreasonableness of Certain Fee Categories.** First, the Amended Application – while
24 addressing many of the patent shortcomings that the Secured Lender and the Court noted in the original
25 application – still seeks a substantial amount of fees for what has been, at all stages in these proceedings,
26 consensual: cash collateral use. HSJ continues in the Amended Application to seek allowance of nearly
27 \$9,000 in fees for work related to what has always been continuous and consensual use of cash
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1 collateral. Approximately 2/3 of the total fees in this category were incurred in the drafting and review
2 of numerous, virtually identical cash collateral stipulations. Interestingly, a significant portion of the fees
3 sought in the Amended Application were incurred in one of the **least** contentious areas of these
4 proceedings, meaning that the estate is being asked to incur expenses for work that merely managed to
5 implement the consensual wishes of nearly all parties. In light of the marginal value of much of this
6 work to the estate, the Court should deny at least a substantial portion of the fees sought with respect to
7 cash collateral use.²

9 Second, the Amended Application seeks approval of nearly \$9,000 in fees incurred in connection
10 with the Debtor's Statements and Schedules. A substantial portion of these fees were incurred in
11 preparing a Schedule F that was objectionable, insufficient, and woefully inaccurate. The Secured
12 Lender pointed out the original Schedule F's many deficiencies and inconsistencies, but rather than
13 simply agreeing to amend the Schedules, HSJ remained recalcitrant and forced the Secured Lender to
14 file a motion to compel amendment of the Schedules – a motion to which the Debtor ultimately
15 acquiesced even before the Court could grant it. HSJ did not acquiesce, however, until the Secured
16 Lender incurred additional fees in responding to expensive objections prepared and filed by HSJ and
17 until HSJ had incurred significant additional fees in preparing for a contested hearing that never
18 occurred. The Debtor agreed to amend the Schedules in precisely the way that the Secured Lender had
19 requested early in the case, yet thousands of dollars in fees later, the Schedules have been again
20 amended at least once to correct additional errors. The estate should not have to pay for the Debtor's and
21 HSJ's obstinance and carelessness.

26 ² HSJ has grown fond of reminding the Court that counsel for the Secured Lender has not attended two hearings on cash
27 collateral use. The hearings were used to enter into the record two identical, fully consensual cash collateral stipulations. The
28 Debtor insists on conducting hearings on consensual stipulated orders, and always conveniently glosses over the completely
understandable and excusable reasons why the Secured Lender's counsel did not appear at two of the many hearings on cash
collateral stipulations in this case. Counsel for the Secured Lender will be happy to explain those circumstances should the
Court desire such an explanation.

1 RESPECTFULLY SUBMITTED this 5th day of May, 2000.

2 SQUIRE, SANDERS & DEMPSEY, L.L.P.

3
4 By: /s/ Jordan A. Kroop

5 Thomas J. Salerno

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9 Attorneys for LaSalle National Bank as Trustee

10 Copy of the foregoing mailed this 5th day of
11 May, 2000 to all parties on the Official
12 Service List in these proceedings.

13 /s/ Donald E. Tanguilig